Supreme Court, U.S.
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NO. 90-1251

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1990

COMMONWEALTH OF PENNSYLVANIA
PETITIONER

V.

CARL FRANZ OGBORNE
RESPONDENT

ON PETITION FOR WRIT OF CERITORARI TO
THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Was the stop of the Respondent's car in his own driveway by three (3) police cars and four (4) officers several hours after the police received a telephone tip a violation of the Respondent's rights protected by the Fourth Amendment?

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COUNTER STATEMENT OF THE CASE

The Respondent was arrested on January 15, 1987, in the driveway of his residence after the police found phencyclidine inside his shirt.

During the early evening hours of January 15, 1987, Detective Glenn Greenwalt of the Delaware County Police received a telephone tip from an informant. The informant told Detective Greenwalt that the Respondent would arrive in the 100 block of Saude Avenue, Tinicum Township in a late model black Dodge automobile sometime later that evening and he would have ten (10) bundles of phencyclidine in his possession. The informant was considered reliable by Detective Greenwalt, since he had given the Detective information that led to a drug arrest in another case. Detective Greenwalt did not ask and the informant did not offer the basis for his information regarding the Respondent.

Detective Greenwalt knew the Respondent had been convicted of possession with the intent to deliver phencylidine in 1981 and 1985, but had no information or reason to believe that Respondent was involved in drug activity in 1987. Detective Greenwalt contacted the Tinicum Township Police and confirmed that Respondent lived in a single house at 115 Saude Avenue and that a new black Dodge was frequently parked in front of the house. A short time later, Detective Greenwalt and several other officers set up a surveillance of the 100 block of Saude Avenue. At 11:20 p.m. they observed a late model black Dodge enter Saude Avenue from 2nd Street and proceed into the 100 block. When the Dodge reached 115 it turned into the driveway and pulled up close to the house. Detective Greenwalt recognized the Respondent as the driver of the Dodge. Detective Greenwalt and two (2) other police cars entered the driveway behind Respondent's car.

Four (4) officers surrounded the Respondent's car and Detective Greenwalt ordered the Respondent to turn off the car's engine. When the Respondent failed to respond, Detective Greenwalt opened the driver's door, reached into the car, shut off the engine and ordered the Respondent to get out of the car.

Simultaneously, another officer opened the passenger's door. After the car doors were opened and the Respondent had exited from his car, the police officers detected the odor of phencylidine. The Respondent was searched and the police found 10 bundles of suspected phencyclidine concealed inside his shirt.

Prior to trial, the Respondent filed a Motion to Suppress the evidence seized by the police and argued that his rights protected by the Constitution of the United States and the Constitution of Pennsylvania had been violated by the police.

The trial Court denied the Respondent's Suppression Motion and found the Respondent guilty of possession with intent to deliver a controlled substance in violation of the Pennsylvania Controlled Substance, Drug, Cosmetic and Device Act. 35 Pa. Stat Ann. 780-113 (a).

An appeal was filed in the Superior Court of Pennsylvania.

On May 1, 1989, the Superior Court of Pennsylvania reversed the defendant's conviction and decided the trial Court had erred when it denied the defendant's pre-trial Suppression Motion.

The Superior Court held that the stop of the defendant's car in his own driveway, by three (3) police cars and four (4) officers, several hours after the police had received a telephone tip, was a violation of the defendant's rights protected by the Fourth Amendment to the United States Constitution.

The Commonwealth Petitioned for allowance of appeal in the Pennsylvania Supreme Court. On March 12, 1990, the Pennsylvania Supreme Court granted the Commonwealth's Petition.

The Commonwealth and the defendant filed briefs and made oral arguments.

However on January 7, 1991 the Supreme Court dismissed the appeals as being improvidently granted and declined to rule on the issues raised in the appeal.

In the Pennsylvania Supreme Court the defendant argued that the stop of his car in his driveway, violated his rights protected by Article 1, Section 8 of the Constitution of Pennsylvania and the Fourth Amendment to the United States Constitution.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

THE DECISION BY THE PENNSYLVANIA SUPERIOR COURT IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT REGARDING INVESTIGATIVE STOPS

The Petitioner contends that the Pennsylvania Superior Court decided an important federal Constitutional question in a way that conflicts with prior decisions of this Court.

The Pennsylvania Superior Court determined that the stop of the Respondent's car, in his own driveway, by three (3) police cars and four (4) officers several hours after the police received a telephone tip, was a violation of the Respondent's rights protected by the Fourth Amendment.

Petitioner contends the Superior Court's decision conflicts with several decisions of this Court, including, Scher v. United States, 305 U.S. 251, 59 S. Ct. 174 (1938); Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921 (1972) and Alabama v. White, 496 U.S. , 110 L.Ed 2d 301, 110 S. Ct.___(1990).

Petitioner's reliance on Scher v. United States, supra, is misplaced. In Scher the search of an automobile that the police followed into a private garage, was approved by the Court as a search incident to the lawful arrest of the car's occupants. Since a warrantless arrest is lawful only when it is supported by probable cause, Scher v. United States, supra, cannot support the police conduct in the instant case. In this case, Petitioner concedes that the police did not have probable cause to arrest the Respondent until after the car's doors were opened and they detected the odor of phencyclidine.

When the police entered Respondent's driveway, they did not have probable cause to arrest Respondent. Therefore, the decision by the Superior Court, does not conflict with Scher v. United States, supra.

The decision in Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921 (1972), can be distinguished from the instant case. In Adams v. Williams, supra. the informant was known to the officer, the informant gave the officer the tip in a face to face meeting on the street and the officer was able to immediately corroborate some of the information because he could see the suspect sitting in a nearby parked car while he was talking with the informant. In addition, in Adams v. Williams, supra. the officer had reason to believe that the suspect was armed with a firearm, Therefore, the Superior Court's decision does not conflict with the Adams v. Williams, supra.

Likewise Alabama v. White, 496 U.S.__, 110 L.Ed. 2d 301, 110 S. Ct.__(1990), can be distinguished from this case. In Alabama v. White, supra. the informants prediction of the suspect's future behavior gave the anonymous tip the needed indicia of reliability to justify the stop. However, since almost everyone comes home eventually, the informant's prediction in this case that Respondent would arrive at his home later during the evening of January 15, 1987, does not demonstrate any special knowledge of the Respondent's affairs. Therefore, the Superior Court's decision does not conflict with Alabama v. White, supra.

More importantly, it does not conflict with this Court's decision in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

In Terry, the Court held that a police officer may in appropriate circumstances, and in an appropriate manner, approach a person for the purposes of investigating possible criminal behavior even though there is no probable case to make an arrest. Terry v. Ohio, supra. at P. 22. Therefore, the manner which an investigative stop is carried out, is as important as the justification for the stop in the first place. This Court said:

> "The 4th Amendment proceeds as much by limitations upon the scope of the governmental action as by imposing preconditions upon it's initiation". Terry v. Ohio, supra., page 1883, 1884.

In the instant case, the Superior Court determined that the invasion of the Respondent's driveway and front yard, by three (3) police cars and four (4) officers, was not an appropriate manner to approach the Respondent for the purpose of investigating a possible narcotics offense.

Furthermore, in Terry, this Court said.

> " We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure...or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances" Terry v. Ohio, supra. at Page 20 or Page 1879.

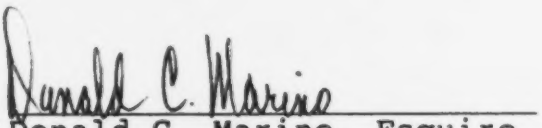
Therefore, the Superior Court's suggestion that the police had sufficient time to apply for a search warrant is also consistent with this Court's language in Terry v. Ohio, supra.

Under the circumstances, there is no significant conflict between this Court's decision regarding investigative stops and the decision made by the Superior Court in the instant case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

F. KIRK ADAMS, ESQUIRE, hereby certifies that he served three (3) copies of the within Respondent's Brief in Opposition on the Petitioners, Commonwealth of Pennsylvania, by hand delivery on Petitioner's counsel, Vram Nedurian, Jr., Esquire, Assistant District Attorney for Delaware County, Pa at his office, Court House, Media, PA 19063, on the date set forth below.

F. Kirk Adams

F. Kirk Adams, Esquire

DATE: March 5, 1991